

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation of the Family
Child Care License of Lori Gilbertson

**ORDER TO STAY THE HEARING
AND DENYING ATTORNEY'S FEES**

This matter came before Administrative Law Judge Barbara J. Case for a hearing on the Licensee's motion for a stay pending the outcome of the Licensee's appeal of a Temporary Immediate Suspension to the Minnesota Court of Appeals and for attorney's fees for the motion. The parties filed briefs on both issues and oral argument on the stay was heard on November 27, 2013.

David W. Hemming, Assistant Chisago County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department). Perry M. de Stefano, Spangler and Stefano, appeared on behalf of the Licensee.

Based on the file and the prehearing record,

IT IS HEREBY ORDERED THAT:

1. The Licensee's **Motion to Stay the Hearing** is **GRANTED**. The Order for Hearing is stayed and all related proceedings in this matter are stayed until the Court of Appeals issues its decision in the Appeal of the Department's Temporary Immediate Suspension (Case No. A13-1259).

2. Attorneys for the parties shall notify Administrative Law Judge Barbara J. Case when the Court of Appeals issues its decision on Licensee's Appeal of the Temporary Immediate Suspension (T.I.S.).

3. The Licensee's **Motion for Attorney's Fees** is **DENIED** for the reasons set forth in the memorandum below.

Dated: December 5, 2013

s/Barbara J. Case

BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

Motion for Stay

Licensee's motion to stay the hearing in this matter was based on, among other things, collateral estoppel, res judicata and a desire to preserve the status quo.¹ The Department's argument against the stay was based primarily on a desire to proceed in a timely fashion on the merits of the underlying licensure issue.² Although the law and standards that apply to a T.I.S. action and a revocation action are different, here the factual basis is the same for both proceedings. Therefore, it is probable that the Court of Appeals decision in the appeal of the T.I.S. will inform both parties' actions with regard to the proposed revocation.

At present, there is no threat to the public's interest because the Licensee cannot operate while the T.I.S. is under appeal.³ If the T.I.S. is not upheld, then the Department will have failed to meet its burden to show that the Licensee's day care poses "an imminent risk of harm to the health, safety, or rights of persons served by the program...."⁴ In the event the Licensee prevails on appeal, she will be able to operate if the Department continues to pursue revocation as is permitted under law.⁵ A stay best balances the public interest in the provision of safe day care services with the Licensee's interest in her licensure. Therefore, to proceed in the most informed manner, to preserve both parties' resources and for the sake of judicial economy, it is reasonable to stay the revocation hearing until after the Court of Appeals issues its decision.

Attorney's Fees

The Minnesota Equal Access to Justice Act (MEAJA) authorizes an award of attorney's fees and costs to a prevailing party in contested cases brought against the State.⁶ Recovery is available only against the State and only in cases where the State's position is substantially unjustified.⁷

However, the definition of party does not include every party to a contested case hearing. The MEAJA expressly excludes from the class of qualified applicants:

A person providing services pursuant to licensure or reimbursement on a cost basis by the Department of Health or the Department of Human Services, when that person is named or admitted as a party in a matter which involves the licensing or reimbursement rates, procedures, or methodology applicable to those services."⁸

¹ Licensee's Memorandum for Staying Hearing.

² Department's Responsive Motion.

³ Minn. Stat. § 245A.07, subd. 2.

⁴ Minn. Stat. § 245A.07, subd. 2.

⁵ Minn. Stat. § 245A.07, subd. 3(b).

⁶ Minn. Stat. § 15.471, *et seq.* (2012).

⁷ Minn. Stat. § 15.472(a).

⁸ Minn. Stat. § 15.471, subd. 6(c).

The plain language of the statute excludes Licensee from the definition of “party” under the MEAJA because she is “a person providing services” pursuant to a DHS license. The Licensee was “named...as a party in a matter which involves the licensing...applicable to those services.” The Office of Administrative Hearings (OAH) has consistently read the MEAJA to exclude the class of parties to which Licensee belongs.⁹ Licensee argues that those prior OAH decisions are without effect especially in light of the unreported Minnesota Court of Appeals case, *Becky Swanson v. Dayton*, 2013 WL 1707674 (Minn. Ct. App. 2013). In *Swanson*, the Court awarded attorney’s fees under the MEAJA to a class of licensed child care providers who challenged an executive order pertaining to their unionization.¹⁰ However, *Swanson* did not involve “a person providing services” pursuant to a DHS license who was “named...as a party in a matter which involves the licensing...applicable to those services.” *Swanson* involved an executive order which would have allowed childcare providers to agree to union representation. That matter did not pertain to “a person providing services...in a matter which involves the licensing or reimbursement rates, procedures, or methodology applicable to those services.” The award in *Swanson* is consistent with the plain language of the statute.

Even were Licensee not excluded from receiving attorney’s fees, she would not qualify for them under the MEAJA at this point in this revocation action. The act allows a party to seek fees “within 30 days of final judgment in the action....”¹¹ There has not been a final judgment in the revocation action. The act also allows only “prevailing parties” to seek an award of fees.¹² Licensee cannot show herself to be a prevailing party in this case because the final judgment has not been issued.

Since Licensee is a member of a class that has been specifically excluded from receiving attorney’s fees under the MEAJA, and since there has not yet been a final judgment, it is appropriate to deny Licensee’s motion for attorney’s fees.

B. J. C.

⁹ See, *In the Matter of The Revocation Of The License of Mary Fiola*, Docket No. 68-1800-30422 (ORDER ON THE RESPONDENT’S APPLICATION FOR ATTORNEY’S FEES AND COSTS) (February 7, 2013), and *In the Matter of the Temporary Immediate Suspension of the Day Care License of Samantha Stone*, Docket No. 4-1800-19490-2 and *In the Matter of the Maltreatment Determination and Revocation of the License of Samantha Stone to Provide Child Care*, Docket No. 2-1800-19957-2 (ORDER ON THE RESPONDENT’S APPLICATION FOR ATTORNEY’S FEES AND COSTS) (June 11, 2009).

¹⁰ *Swanson* at 1.

¹¹ Minn. Stat. § 15.472, subd. (b)

¹² Minn. Stat. § 15.472, subd. (a)